9/16/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Crown Central Petroleum Corp.,	)	TSCA Docket No. VI-551C
	)	
Respondent	)	

ORDER ON MOTIONS FOR ACCELERATED DECISIONS

The complaint in this case has been issued under the Toxic Substances Control Act ("TSCA"), section 16(a), 15 U.S.C. 2615(a), and charges Respondent, Crown Central Petroleum Corporation, with several violations of the regulation governing the manufacturing, processing, distribution in commerce and use of polychlorinated biphenyls ("PCB Ban Rule"), 40 C.F.R. Part 761. Crown has moved for an accelerated decision dismissing the charges in Count I that Crown failed to maintain the records of inspection and maintenance history of 21 "PCB Transformers", as required by 40 C.F.R. section 761.30(a)(1)(xii), and in Count II that Crown failed to mark these transformers, as required by 40 C.F.R. section 761.40(c)(1). The EPA has moved for an accelerated decision on Crown's liability with respect to the violations charged in all four counts of the complaint.

The principal question raised by the motions is whether the 21 transformers are PCB Transformers.

It is Crown's position that the transformers are PCB-Contaminated Electrical Equipment as defined in 40 C.F.R. 761.3, containing between 50 and 499 parts per million ("ppm") PCB's, for which maintenance and inspection records do not have to be kept and which do not have to be marked. The EPA, on the other hand, claims that the transformers fall in the category of PCB Transformers, containing 500 ppm PCBs or more, because at the time of the inspection no information was made available as to the type of dielectric fluid they contained and the dielectric fluid had not been tested to determine its PCB concentration.

Crown in its answer denies the allegation that there was no information available to indicate the type of dielectric fluid in the transformers. In its motion for accelerated decision it has produced nameplate information for the 21 transformers. The nameplates for 12 of these transformers indicate that they are oil-filled with 9 nameplates showing that the dielectric fluid is a mineral oil.[1] There is no nameplate information for the remaining transformers indicating the type of the dielectric fluid, but Crown asserts that the absence of information affirmatively disclosing that the transformers contain a PCB dielectric fluid combined with information available to it in its files indicates that the dielectric fluid is less than 500 ppm. Crown has also produced test

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[1] These are the nameplates for the transformers listed in Paragraph 6 of the complaint as A, C, D, E, G, and I-O. The 9 transformers with nameplates admittedly showing mineral oil are 6.A, 6.E, 6.G, 6.J - 6.O. The nameplates for 3 transformers, 6. C, 6. D and 6. I, simply state that they have an oil dielectric, which the EPA claims is not sufficient to indicate a mineral oil as distinguished from a PCB dielectric fluid.

results for the 21 transformers, dated shortly after the inspection, showing that the PCB content for all of them was less than 500 ppm.[2] Accordingly, it moves for an accelerated decision dismissing Counts I and II of the complaint.

To support its position, the EPA relies not on language in the regulation itself but on a statement in the preamble to the original regulation that if a transformer does not have a nameplate or if there is no information available to indicate the type of dielectric fluid in it, the owner or operator must assume the transformer to be a PCB Transformer.[3]

The EPA's assumption is, in reality, a presumption which the EPA claims is created under the PCB Ban Rule. The facts giving rise to the presumption are (1) there is no nameplate on the transformer and no other information available to the owner or operator which indicates the type of dielectric fluid in the transformer and (2) the dielectric fluid has never been tested for its PCB concentration. If these facts are established, the transformer is regulated under the PCB Ban Rule as a PCB Transformer containing 500 ppm or more PCBs.

Crown vigorously contests the validity of this presumption,

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[2] Most of the transformers tested <2 ppm PCBs. The highest PCB concentration shown was 310 ppm for one transformer.

[3] 4 Fed. Reg. 31514, 31517 (May 31, 1979). It is clear from the language of the preamble that the assumption with respect to the category in which to put the transformer applies to the owner or operator. 44 Fed. Reg. at 31517. Consequently, it necessarily follows, if the language is to make any sense, that the information relating to the type of dielectric fluid in the transformer must be available to the owner or operator.

saying that it is not supported by the language of the regulation and, in fact, is inconsistent with it. It is true that the preamble cannot impose regulatory requirements. This can be done only by the regulation itself. It is, however, appropriate to turn to the preamble for guidance in construing the regulation if there is a question as to what was meant or intended by the wording.[4]

The regulation defines a PCB Transformer as a transformer that contains 500 ppm or more PCBs, and also provides that oil-filled electrical equipment, which includes transformers, must be assumed to be PCB-Contaminated Electrical Equipment, i.e., contain from 50 ppm PCBs to 499 ppm PCBs. The regulation is silent as to the category in which a transformer should be placed when it is not known whether the dielectric fluid is a PCB or a non-PCB mineral oil.

The regulation in explaining its prohibitions stresses that there is a high probability of human and environmental exposure to PCBs, that any exposure to human beings or the environment may be significant and there is a need to insure that PCBs are properly handled and disposed of.[5] Items containing PCBs in concentration of 500 ppm or greater are specially marked and subject to more stringent disposal and inspection requirements than items containing less than 500 ppm PCBs. What is singled out, in short,

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[4] See Colorado v. Idarado Mining Co., 916 F. 2d 1486, 1496 (10th Cir. 1990), cert denied, __ U.S.____, 113 L. Ed. 2d 648 (1991) (court refers to preamble in construing a regulation).

[5] See introductory statement to the Prohibitions, 40 C.F.R. 761.20.

is the need to protect against exposure to PCBs, which would favor giving the PCB Ban Rule an interpretation that would give the maximum protection consistent with the language of the regulation.

Crown argues that the fact that the regulation specifically provides that oil-filled transformers are assumed to PCB-Contaminated but makes no provision for transformers where there is no information indicating the type of dielectric fluid, justifies its assumption that only transformers known to contain PCB dielectric fluid are to be treated as PCB Transformers and that other transformers may be handled as PCB-Contaminated. The assumption relating to oil-filled transformers lends itself just as readily to the narrow reading that it applies only to transformers containing mineral oil as it does to the expansive reading that Crown would give it that it applies to all transformers except transformers known to contain a PCB dielectric fluid.

The result, favoring an interpretation that would place transformers with an unknown dielectric fluid in the same category as the less-hazardous transformers with a known mineral-oil dielectric fluid is sufficiently ambiguous and at odds with the tenor of the regulation as a whole to justify recourse to the preamble to see what was intended.[6] In this case, the preamble is clear that what was intended was that the transformer owner or

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[6] Crown's construction would also discourage testing the dielectric fluid except where Crown desired to establish that the fluid contained <50 ppm PCBs. Otherwise, by testing, Crown would only run the risk of subjecting itself to more stringent requirements if the fluid tested 500 ppm PCBs or more. This result also seems contrary to the purpose of regulation.

operator should assume that the transformer is a PCB Transformer unless there is evidence indicating otherwise.

The presumption that Crown's transformers are PCB Transformers only comes into play if the underlying facts on which it is predicated are established. The issue in dispute as framed by the pleadings is whether at the time of inspection there was information available to indicate the type of dielectric fluid in the transformers.[7]

The EPA argues that since the nameplate information and other information which Crown asserts it now has to justify its treating the transformers as PCB-Contaminated was not made available to the EPA inspector, it was information that Crown did not know about until after the inspection and cannot excuse its failure to inspect and keep records with respect to the transformers or to mark them.

If Crown can show that the transformers' nameplates indicated that they contained a non-PCB dielectric fluid or that there was information that Crown had or knew about prior to the inspection indicating that the transformers were filled with a non-PCB dielectric fluid, this would seem sufficient to rebut the presumption that the transformers are PCB Transformers so far as maintaining records of inspection and maintenance and marking them are concerned. On the other hand, information obtained after the investigation from tests or from the manufacturer of the transformers would not excuse the violations, although it may be

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[7] Crown admits that at the time of inspection the transformers had not been tested for their PCB concentration.

relevant to the determination of the appropriate penalty.

Crown has produced nameplates for 9 of the transformers that admittedly show that they contained a mineral-oil dielectric. Crown has also submitted the affidavit of a Mr. John A. Jones that the fact that none of the nameplates indicated that the transformers contained a PCB dielectric fluid combined with other information available to Crown indicated that the transformers were PCB-Contaminated Electrical Equipment. This is sufficient to raise a factual issue with respect to Counts I and II as to whether Crown properly categorized the transformers as PCB-Contaminated Electrical Equipment.

One of the issues raised by the pleadings is what constitutes "available information" so as to justify Crown's handling of the transformers as PCB-Contaminated Electrical Equipment. The EPA has submitted in support of its motion the affidavit of the EPA inspector that the nameplate information Crown has produced was not made available to her at the inspection. The claim is made that this is proof that whatever nameplate or other information Crown had was information Crown did not learn about until after the inspection. Possibly, there could be circumstances where even the nameplate information indicating a mineral-oil dielectric fluid should not be considered available information for purposes of determining compliance with the requirements of the PCB Ban Rule. Whether such circumstances exist in this case is a factual question to be determined on the basis of the facts established at the hearing.

The EPA also moves for an accelerated decision on liability with respect to the violations charged in the remainder of the complaint and set out in Counts III and IV.

Counts III and IV relate to the preparation of the annual document required by 40 C.F.R. 761.180(a). Crown must prepare this document if it uses or stores 45 kilograms (99.4 pounds) of PCBs in PCB Containers, or one or more PCB Transformers. Count III charges Crown with a failure to prepare a 1990 annual document, and Count IV charges that Crown's annual documents for certain other years were incomplete.

For proof of these violations, the EPA relies on certain other evidence besides that relating to the 21 transformers alleged in Counts I and II to be PCB Transformers. One piece of evidence is a document obtained from Crown's files which is inconclusive on what it purports to show.

The EPA also relies upon a letter from Crown in July 1992, after the complaint was issued, stating that laboratory tests for one transformer apparently previously classified as PCB-Contaminated Electrical Equipment disclosed that the dielectric fluid contained 3200 ppm PCBs, thus making it a PCB Transformer, and upon exhibits submitted in Crown's prehearing exchange which are asserted to show that Crown stored more than 45 kilograms PCBs in PCB Containers. Crown questions the use of such evidence, asserting that it is outside the scope of the complaint and should not be allowed to be used unless the complaint is amended. Since there is going to be hearing on whether the 21 transformers

identified in Counts I and II are PCB transformers, and resolution of that question could make it unnecessary to decide Crown's objections, no useful purpose would be served by attempting to rule upon the objections now.

The EPA's motion for an accelerated decision finding Crown liable for violations charged in the complaint, accordingly, is denied.

Crown, for its part, argues that the absence of information on the transformers' nameplates indicating that they contained a PCB dielectric fluid as well as the presence of information on several of the nameplates showing that they were oil-filled entitles it to dismissal of the violations charged in Counts I and II of the complaint for failure to keep records of inspection and maintenance and for failure to mark. For the reasons already stated, the absence of nameplate information affirmatively indicating that the transformer contains a PCB dielectric fluid does not in itself justify handling the transformers as PCB-Contaminated Electrical Equipment. Additionally, the statement on three of the nameplates that they contain oil without further identifying the kind of oil is sufficiently ambiguous that it also does not in itself justify Crown's placing these transformers in the category of PCB-Contaminated Electrical Equipment.

The presence of nameplates indicating a mineral oil dielectric fluid on 9 of the transformers would seem to justify Crowns' categorization of these transformers as PCB-Contaminated Electrical Equipment within the language of the regulation. The EPA, however,

has raised the issue as to whether this information was available prior to the investigation and on this issue it does appear that there may still be facts to be established.

Crowns' motion to dismiss Counts I and II of the complaint, accordingly, is denied.

One final matter to be considered is the effect to be given to the presumption that transformers of unknown dielectric fluid are to be handled as PCB Transformers. Although not discussed by the parties, it is considered here because it could be important to the parties in deciding how they will present their case.

There are, in reality, two issues to be decided in determining whether the presumption applies. First, there is the issue of whether the information is sufficient to indicate that the transformers contain a mineral-oil dielectric. Second, there is the issue of whether this information was available to Crown prior to the inspection.

At a minimum, the presumption shifts the burden to Crown of coming forward with evidence on both issues, namely, that information available to Crown prior to the inspection indicated that the transformers contain a non-PCB mineral oil.[8] Does the presumption also shift the burden of persuasion on either or both of the issues to Crown? Under the rules of procedure, the burden of production of evidence as well as of persuasion with respect to the

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[8] The words "oil-filled" as used in the PCB Ban rule to establish the assumption that the transformers contain <500 ppm PCBs obviously refer to a mineral-oil dielectric fluid. It would not make sense to interpret these words otherwise.

facts establishing the violation would normally be upon complainant.[9] Here, the material facts alleged to constitute the violation are that there was no information available indicating the type of dielectric fluid. Shifting to Crown the burden of coming forward with evidence to show otherwise gives effect to the presumption. Indeed, it is reasonable to impose such a burden on Crown, since the evidence is the kind that would be in Crown's possession.[10]

I find no reason, however, why the burden of persuasion should also be changed from the normal rule. Accordingly, it is complainant's burden to establish that the evidence that there was no information available to Crown prior to inspection indicating the type of dielectric fluid in the transformer preponderates over the opposing evidence and not Crown's burden to show the contrary.[11]

The EPA also moves to strike Crown's affirmative defense of the statute of limitations. That motion is denied. Although the EPA has rejected the defense in the cases cited, the defense cannot be

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[9] 40 C.F.R. 22.24.

[10] See Environmental Defense Fund v. EPA, 548 F. 2d 998, 1004 (D.C. Cir. 1976, cert denied, 431 U.S. 925 (1977) (Traditional approach in allocating the burden of going forward with evidence to make a prima facie case is that the burden normally falls on the party having knowledge of the facts involved).

[11] See 40 C.F.R. 22.24.

considered legally insufficient. The question is now pending before the court of appeals on appeal from one of those cases. In the Matter of 3M Company, Docket No. TSCA Appeal No. 90-3 (Feb. 28 1992), appeal docketed, No. 92-1126 (D.C. Cir).

Gerald Harwood
Senior Administrative Law Judge

Dated: September 16, 1993

In the Matter of Crown Central Petroleum Corp., Respondent
TSCA Docket No. VI-551C

Certificate of Service

I certify that the foregoing **Order on Motions For Accelerated Decisions**, dated September 16, 1993, was sent this day in the following manner to the addressees listed below.

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Dated: September 16, 1993